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In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 469.

OIL CITY REFINERS, INC.,
Petitioner,

vs.

SOCONY-VACUUM OIL COMPANY, INCORPORATED,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN J. MANNING,
New York City,
Counsel for Respondent.

FRANK E. LEWELLEN,
Detroit, Michigan,

C. W. SELLERS,
Cleveland, Ohio,
Of Counsel.

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PETITIONER'S STATEMENT OF "SUBJECT-MATTER" IS INACCURATE.

Petitioner has misstated certain material facts. These misleading and inaccurate statements set forth in the Petition are herewith pointed out and clarified.

Petitioner has stated (Petition, p. 4) that Respondent's answer to Petitioner's counterclaim admitted the use by Petitioner of the symbol of a flying horse as a *Trade-mark*; that it admitted the Ohio registration by Petitioner of the flying horse as a *trade-mark*, and that it admitted that there had been negotiations, conferences and correspondence between the parties concerning *Petitioner's claim of infringement*. Those statements are all overstatements. Respondent's answer did admit the use by Petitioner of the symbol of a flying horse, but it did not admit that such use was a *trade-mark* use. It admitted the registration of the symbol by Petitioner under the Ohio Statute, but it did not admit that such registration was a *trade-mark* registration. It admitted that subsequent to October 27, 1937, there had been conferences between the parties,

but it does not admit that such conferences *concerned Petitioner's claim of* infringement, or that they occurred because of such claim.

Petitioner has further stated (Petition, pp. 5-7) what it contends are the findings of fact, and the conclusions of law made by the Master. The Petition contains the statement that the Master found as a fact that after October 1934, there was a partial cessation of the use of the mark by Petitioner at some of its stations. The use of the words "partial cessation at some of its stations" is grossly misleading. The facts as found by the Master upon this question are as follows:

> "(5). From April, 1934, and into September, 1935, nearly if not quite all of the defendant's stations then numbering about twenty-two, were devoted to sale of the products of the American Oil Company (Amoco) and the use of the flying horse as a mark practically was discontinued during this period.
>
> "(6). After September, 1935, and until the latter part of 1937, many (about twelve) of the defendant's stations were devoted to the sale of the Columbia Refining Company products and its signs and marks were used by the defendant at these stations. Some of the stations also displayed the mark of Hi-Speed Blue Flash gasoline product of the Pocahontas Oil Company and its successor. At some time in this period the defendant resumed the use of a flying horse as a symbol at some of its stations but the evidence of this is conflicting and unsatisfactory." (R. 51.)

The further statement is made that the Master found as a fact—"That when Petitioner, after partial cessation, resumed the use of the flying horse generally in September 1935 * * *." Again, the phrase "partial cessation" is misleading as heretofore pointed out, and the Master did not find as a fact that Petitioner resumed the use of the

mark generally in September 1935. The Master simply found, as a fact, that at some time during the period from September 1935 and the latter part of 1937, Petitioner resumed the use of a flying horse as a symbol "*at some of its stations*, but the evidence of this is conflicting and unsatisfactory."

The Petition contains the further statement that the Master concluded that Petitioner's cessation of the use of the mark did not amount to abandonment, and that Petitioner was not guilty of laches. That statement is only a half truth and is grossly misleading. The pertinent language in the Master's report relating to the questions of abandonment and laches is the following:

> "So far I have considered those questions of abandonment and laches as if their respective determinations were the only questions involved and upon which the decision of the case might rest.
>
> "But while I think that the determination of either question standing alone, would not justify a judgment for the plaintiff in this case, I am of the opinion that the facts and circumstances shown by the evidence upon these two issues are important upon what I consider to be the ultimate questions upon which such decision must rest.
>
> "It is this:
>
> Upon the entire record before us, what judgment should be rendered in order that substantial justice may be done as between these parties?" (R. 47.)

THE PETITION PRESENTS NO REVIEWABLE QUESTION.

There is no reviewable question of fact or of law presented by this Petition. The Petition represents an attempt on the part of the Petitioner to avoid the effects of the findings below and to divest the Petitioner of the fraud and unfair competition with which it stands charged in those findings. This attempt is followed with an argument based upon one narrow aspect of the case, namely, priority of

use, an argument which ignores all the vital facts and findings upon which the decisions below are premised. Respondent respectfully submits that unless and until this Honorable Court sees fit to reverse itself and review the concurrent findings of all courts below, and to indulge in such review in the face of a record so diminuted as to be wholly inadequate, for the purpose sought by Petitioner, there is nothing here to consider.

Petitioner contends that sixteen (16) questions are presented by the decision of the Circuit Court of Appeals. Substantially all such questions either assume a state of facts not established by the record before this Honorable Court, or postulate legal and equitable doctrines wholly inapplicable to the facts found and confirmed. The sixteenth such question relates solely to an award of costs by the Circuit Court of Appeals to one John Roski, who was a defendant and appellee in the courts below. John Roski is not a party to the Petition herein, hence, no relief may be rendered on his behalf pursuant to this Petition.

UNFAIR COMPETITION BY PETITIONER WAS FIRMLY ESTABLISHED.

(Petitioner's Argument III.)

The Petition should be denied, because it represents an attempt to reverse and rewrite the findings of fact of the Special Master, which were approved and confirmed by the District Court and the Circuit Court of Appeals.

This is exemplified on page 32 of Petitioner's brief. Although Petitioner has been found guilty, by the courts below, of deliberate fraud, disregard of public right and an intention to appropriate to itself a part of Respondent's good will and business, Petitioner argues:

> "Fraud, in the case at Bar, therefore, was not by the Petitioner, but by Respondent in wantonly appropriating Petitioner's trade mark in the territory where Petitioner had established it."

This argument, which was urged below, is now irrelevant and immaterial.

This Court accepts the concurrent findings of the lower courts and will not review the weight of the evidence. *Just v. Chambers,* 312 U. S. 383, 85 L. Ed. 903, 61 Sup. Ct. 687; *U. S. v. Bethlehem Steel Corp.* 315 U. S. 289, 86 L. Ed. 855, 62 Sup. Ct. 581; *Williams Company v. Shoe Machinery Corp.,* 316 U. S. 364, at page 367, 86 L. Ed. 1537, 62 S. Ct. 1179.

The findings of law complained of represent the well-settled principles of the law of unfair competition, applicable to the facts as found. Petitioner advances a confused argument about technical trade-marks, in criticism of the application of those principles, as and for a vehicle to this Court. The argument is without merit.

This argument on the part of Petitioner is to the effect that if a technical trade-mark is involved in an unfair competition case, a court of equity is permitted to consider priority of use only, and nothing else, even though the evidence has established that the Petitioner was guilty of deliberate fraud, disregard of public right and an intention to appropriate to itself a part of Respondent's good will and business. (R. 52, 53.)

A technical trade-mark is merely a classification in the field of trade-marks, and enjoys no privilege or favor, when unregistered (Petitioner's trade-mark was not registered under the Federal Act), except that in infringement and unfair competition cases, proof of fraud is unnecessary, whereas such proof is necessary when non-technical trade-marks are involved. *Safe-Cabinet Company v. Globe-Wernicke,* 3 O. App. 24, at p. 39:

> "* * * The objection made by defendant that many of plaintiff's cases are where a registered trade mark was being used and therefore do not apply, is not well taken, as the difference between the cases of the registered or technical trade marks and cases merely of trade names is in regard to the manner of proof—

> fraud being presumed in the first class of cases, while it must be proved in the latter class * * *."
>
> *Drake Medicine Company v. Glessner,* 68 O. S. 337, at 358, 67 N. E. 722.

Thus the designation is for the purpose of distinguishing those trade-marks which do not require proof of fraud in infringement and unfair competition cases. The distinction has to do solely with the burden of proof, and not at all with the principles of law and equity applicable, which principles are but a part of the broader law of unfair competition. *Hanover Star Milling Co. v. Metcalf,* 240 U. S. 403, at pp. 412-413, 60 L. Ed. 713, 36 S. Ct. 357.

Once jurisdiction is properly obtained, it "proceeds to deal with all grounds supporting it, including unfair competition with the marked article." *Armstrong Co. v. Nu-Enamel Corp*, 305 U. S. 315, at pp. 324, 325, 83 L. Ed. 195, 59 S. Ct. 191. Both the complaint and the counterclaim in this case, charged unfair competition. The case was disposed of on that issue, by the courts below. This Petitioner now claims something for a technical trade-mark, which has no basis in law or in fact. Its argument runs counter to the decisions of this Court, and does violence to a rule so thoroughly established "that any discussion of the cases in this and other courts affirming it would be useless." *Wagg v. Herbert,* 215 U. S. 546, at 551, 54 L. Ed. 321, 305 S. Ct. 218:

> "* * * it is well established that in a suit in equity between parties, in which fraud, oppression and undue influence are charged, the court is not concluded by that which appears on the face of the papers, but may institute an inquiry into the real facts of the transactions. So thoroughly is this doctrine established that any discussion of the cases in this and other courts affirming it would be useless. They rest upon elementary principles of equity. It is sufficient to refer to *Russell v. Southard,* 12 How. 139, and the many authorities cited in the opinion."

There is a further reason why the petition should be denied. Petitioner asks the impossible of this Court. The Master heard the conflicting testimony of 100 witnesses, considered 2,708 pages of Record and over 640 Exhibits. Only meager portions of the testimony of 13 witnesses and only 33 Exhibits appear in the Record in the Circuit Court of Appeals. The same condition exists in this Court. If review is permitted, obviously this Court would have to assume that the findings of fact made by the Master and approved by the courts below are sustained by the evidence. Since those findings establish that Petitioner was guilty of deliberate fraud, disregard of public right and an intention to appropriate to itself a part of Respondent's good will and business, the Petitioner could not be granted any relief by this Court.

THE REASONS RELIED UPON BY PETITIONER ARE UNSOUND.

Petitioner urges as its reasons for the issuance of a Writ of Certiorari—(1) that the Circuit Court of Appeals has decided an important question of local law in a way *probably* in conflict with applicable local decisions; (2) that said Court has decided an important question of trade-mark law which has not been and should be settled by this Court; and (3) that said Court has decided a question of trade-mark law in a way *probably* in conflict with the most applicable decision of this Court, namely, the decision in *United Drug Co. vs. Theodore Rectanus Co.* (248 U. S. 90).

The first such ground completely ignores the fact that the confusion which Petitioner seeks to abate *was of its own creation.* It caused the unfair competition in trade for which it seeks relief. Each court below has securely fastened on Petitioner the charge of unfair competition. Under these circumstances this Honorable Court will not substitute its judgment for that of the Master and the trial court. *Elgin National Watch Company vs. Illinois Watch*

Company, 179 U. S. 665, 674. There is no law in the State of Ohio in conflict with the general principles applicable hereto and Petitioner cites no local authorities in support of the first of its reasons for the issuance of the Writ sought.

The second ground advanced by Petitioner is wholly foreign to the decision of the Circuit Court of Appeals and is equally unimportant in this Court. Petitioner, in reality, contends under this ground that the Circuit Court of Appeals committed error in its refusal to apply the law of technical trade-marks to the exclusion of all other equitable principles.

Implicit in Petitioner's reasoning is the claim that the Circuit Court of Appeals was not empowered to consider all the issues, or the record of conflicting testimony as a whole, or to render "a decision in accordance with a correct balance of the equities of the case" (R. 49), although sitting as a Court of Equity. The suggested limitation is novel to Equity doctrine. Courts of equity "* * * are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." *Ford, et al. v. Buffalo Eagle Colliery Co. et al.,* 122 F. 555 at 563. The exercise of that discretion which courts of equity have applied continuously in the past, by balancing the equities and regarding the substance, is not error, but is the proper performance of the function and duty of such courts.

Peninsular Chemical Co. v. Levinson (C. C. A. 6) 247 Fed. 658;

Vogue Co. v. Thompson Hudson Co., et al. (C. C. A. 6), 300 Fed. 509;

White Tower System Inc. v. White Castle System of Eating Houses Corporation (C. C. A. 6) 90 Fed. (2d) 67;

Jenney Manufacturing Co. v. Leader Filling Stations Corporation, 291 Mass. 398, 196 N. E. 852.

The third reason relied upon by Petitioner assumes that the decision of the Circuit Court of Appeals is in conflict with the most applicable decision of this Court in *United Drug Co. v. Theodore Rectanus Co.* (248 U. S. 90). An examination of this Court's decision in the *Rectanus* case clearly shows that it has no application to the facts in the case now before the Court on this Petition. There was nothing in the *Rectanus* case, aside from the question of trade-mark infringement, to sustain the allegation of unfair competition. The use of the mark there was carried out by the parties and their respective predecessors—*in perfect good faith.* It has been established beyond peradventure that the Petitioner herein, in selecting a single symbol and remodeling it to resemble the mark of Respondent, did so for a sinister purpose. That such conduct, with design inimical to the interests of Respondent, will be restrained is clear from the decision of this Court in *Hanover Milling Co. v. Metcalf,* 240 U. S. 403, 415. When fraud, bad faith and unfair competition have been properly found and firmly attached to Petitioner, as has been finally determined, the process of this Court will not be slow to effectively intervene. Petitioner urges this Honorable Court to depart from its long established Equity doctrines and adopt a new concept of jurisprudence, however revolting, for the sake of expediency. As an aid to accomplishment of such objective Petitioner urges that the presence of its counterclaim, without more, ought to serve as a convenient conduit through which its established multifarious vices may pass unnoticed and re-appear, well cleansed, with ample virtue. The mere statement is sufficient proof of Petitioner's fanciful claim. It has no merit whatever.

RESPONDENT'S REGISTRATION AND USE ABROAD.

(Petitioner's Argument II.)

Petitioner has pointed out (Petition, p. 31) that under the decision in *United Drug v. Rectanus* (248 U. S. 90) neither Respondent's prior federal registration, nor its prior use of the mark abroad has given Respondent any right as against Petitioner in Ohio. Respondent has never contended otherwise and the Master so stated in his report. (R. 29.)

Petitioner, however, has made the statement that the District Court based its conclusions on Respondent's prior federal registration and on its prior use of the mark abroad. Respondent does not so concede. The mere fact that the District Court recited in its opinion, and in its judgment, that Respondent had registered its trade-mark in 1911 and that it had used the mark in foreign trade since 1916, does not mean that its decision of the case is *based* upon those established facts, or that the decision would be otherwise if such facts were not established. The judgment of the District Court confirms the Master's findings of fact, and his conclusions of law, except as modified with respect to the relief granted. It is clear that the judgment of the District Court, as affirmed by the Circuit Court of Appeals, in no way rests for support either on Respondent's prior registration, or upon its prior use of the trade-mark abroad. It is equally clear that Respondent's evidence amply demonstrated, by way of historical outline, its conception and registration of the trade-mark in 1911, and its use abroad for a great number of years before adopting it in the United States as its national symbol.

THE OHIO LAW.

(Petitioner's Argument IV.)

Certainly the Ohio law controls. It is in accord with the general law. In Ohio, as anywhere else, if the sole issue of fact, in an unfair competition case involving a technical trade-mark, was the single and narrow question of priority of use, the party first in time would prevail. That is the rule followed in the cited Ohio cases where such single and narrow issue was involved. Petitioner seeks to convey the impression that the issues were likewise limited in this case. They were not. The Special Master held, quoting from *Jenney Manufacturing Company v. Leader Filling Stations Corporation,* 291 Mass. 398, 196 N. E. 852, 26 U. S. P. Q. 185:

> "The issue presented is not merely one of priority of use, but rather of superiority of right to the protection of the court." (R. 48.)

The Special Master further said upon this subject:

> "Upon the entire record before us, what judgment should be rendered in order that substantial justice may be done between these parties?"
>
> "And in this case the conclusion, I think, must be reached with some regard for the public interest involved." (R. 47.)

In judging "the entire record," in order to do substantial justice and "with some regard for the public interest involved" consideration of the following factors was required, namely, (1) Petitioner's original use of trade symbols which were widely different from Respondent's trade-mark, which trade symbols, except for Respondent's extensive advertising, "had little significance in connection with the good will of defendant's (Oil City Refiner's, Inc.) business" (R. 49); (2) Petitioner's cessation of use over a long period of time when Respondent was widely advertising its products under its trade-mark; (3) Petitioner's

resumption of use, knowing the trade value which then attached to Respondent's trade-mark, and (4) Petitioner's use, finally, of the flying red horse more closely resembling Respondent's trade-mark. Consideration of these issues led to the following conclusion of law:

> "The entire circumstances of defendant's conduct in cessation of use of this symbol to identify its trade and product over the period of time when such cessation is shown, its resumption of use of the symbol, knowing of the trade value which had been attached to it by the plaintiff, and finally using a red flying horse to the exclusion of any other color, are such as to indicate a disregard of the public right and an intention to appropriate to itself a part of plaintiff's good will and business, which should not be permitted." (R. 52, 53.)

Consideration of these issues, by the Circuit Court of Appeals, led to the following statement which appears in the opinion, of that Court. (R. 272.)

> "Oil City (Petitioner), over the course of the years, has used various trade symbols. To permit it to select out of this group a single symbol and remodel it to resemble the mark of each new competititor entering the territory where Oil City is doing business, would broaden the scope of legitimate monopoly into the field of unfair trade."

Thus, there was not one single issue, as Petitioner attempts to indicate. On the contrary, the issues were sufficiently numerous and complex to compel disposition of the case by application of the test, namely, which party was entitled to "superiority of right to the protection of the court." (R. 47.)

There remains the question of the effect of Petitioner's registration (after filing of the complaint herein) under Ohio General Code Sec. 6240, sub-sections 1-4. The Special Master found that "the respective rights of the parties upon the evidence in this case are not affected by defendant's (Petitioner's) registration in Ohio under the

Ohio statute." (R. 53.) The findings of the Special Master were approved.

Registration, under an Ohio statute after the complaint in this case was filed, cannot confer a title to a trade-mark, if some other individual has acquired a superior right. *Bisceglia Bros. Corporation v. Fruit Industries, Ltd.* (D. C. E. D., Pa.), 20 F. Supp. 564, 567; affirmed (C. C. A. 3rd) 101 F. (2d) 752; cert. den. 307 U. S. 646, 59 S. Ct. 1043, 83 L. Ed. 1526; *Sweet Sixteen Co. v. Sweet "16" Shop, Inc.* (C. C. A. 8th), 15 F. (2d) 920, 921, 924; *General Shoe Corporation v. Rosen* (C. C. A., 4th), 111 F. (2d) 95, 97; *Harvey v. American Coal Company* (C. C. A. 7th), 50 F. (2d) 832, cert. den. 284 U. S. 669, 52 S. Ct. 43, 76 L. Ed. 566; *Coca-Cola Company v. Stevenson* (D. C. S. D., Ill.), 276 F. 1010, 1015, 1016.

Furthermore, Ohio General Code Section 6240, subsections 1-4, and Petitioner's acts thereunder, have no relevancy in the disposition of this case. That statute is a part of the "police regulations" of the state of Ohio, and relates solely to the subject of proof of ownership of personal property, not to the subject of trade-marks or unfair competition. It is, in short, a "milk bottle statute" which was intended to be used for the identification of personal property, in replevin cases. A copy of the statute is attached hereto as an appendix. Examination thereof will promptly demonstrate that no Ohio Trade-Mark statute is ever remotely involved in this case.

JURISDICTION OF COUNTERCLAIM.

(Petitioner's Argument V.)

Petitioner's counterclaim was just as much before the court as Respondent's charge of unfair competition, as Petitioner alleges. The counterclaim charged infringement and unfair competition and sought relief on both grounds. (R. 8, 9.) Under the issues it was proper to dispose of the complaint and the counterclaim on the ground

of unfair competition as the courts below have done. Furthermore, the fact that a technical trade-mark was involved is immaterial under the facts found, because such mark enjoys only the benefit pointed out in Respondent's argument, hereinbefore, entitled "The Law of Unfair Competition was Properly Applied Below." Petitioner's argument to the contrary represents the high point of the confusion existing in the Petition and the argument in support thereof.

THE FINDINGS ARE CLEAR AND WERE PROPERLY UNDERSTOOD BY THE COURTS BELOW.

(Petitioner's Argument VI.)

Petitioner charges that:

> "The Court of Appeals fell into a grave error in assuming that the Master had found that the petitioner had 'sporadically' used the representation of the *flying horse* as a trademark, whereas all that Master held in that connection was that the use of the color *red* for petitioner's flying horse was sporadic."

In describing the Master's findings, the Circuit Court of Appeals said:

> "The use of a red horse during this period was sporadic." (R. 268.)

The Master found:

> "Such use of a *red* horse as there may have been was inconspicuous and sporadic."

Since the court's language was almost identical with that of the Special Master, there is no justification for Petitioner's statement first quoted.

Petitioner quarrels about the court's use of the word "remodel." (R. 272.) The Court also used the word "refined" (R. 271, 272) in describing the Master's diction, namely, a "somewhat less streamlined type of flying horse." (R. 48.)

The court's words bear the same connotation as those of the Special Master, namely, that there was a remodeling of, and a change, in Petitioner's symbol. In the same paragraph (p. 37), Petitioner makes two serious misstatements of fact, namely:

> "It is admitted by both parties that respondent's original portrayal of a flying horse was confusingly similar to that of petitioner."
>
> "The insignificance of any change made in petitioner's portrayal of its flying horse is evidenced, for instance, from a comparison of petitioner's early flying horses * * *"

There is nothing in the record to support the statement first quoted, and it is untrue, because Respondent's position in the courts below was that Petitioner's original symbol was not confusing or objectionable. It became confusing and objectionable when it committed the acts of fraud with which it stands charged in the findings and judgment below. The second statement is likewise untrue. The significance of the changes made by the Petitioner is very great and important. The evolution of those changes is portrayed in the sequence of exhibits beginning with Exhibit 81 and ending with Exhibit 22, in the certified copy of the record. (R. 109-149.) Only the certified copy of the record filed by Petitioner contains true copies of the Kodachrome exhibits. These true copies of the exhibits were omitted from all other copies of the record filed by the Petitioner in this Court. A cursory examination of these exhibits will demonstrate the incorrectness of the statement last quoted above.

Petitioner further says (p. 38):

> "The Court of Appeals implies that if petitioner had used only a white flying horse, he could have stopped the use of a red flying horse by respondent."

Again, this is an incorrect statement. What the court said was (R. 270, 273):

> "The Master found that Oil City was the first user of the flying red horse as a trade symbol of the Cleveland territory and the court adopted this theory * * * If nothing else appeared in the case, this finding would be sufficient to support Oil City's counterclaim, and it would be entitled to an injunction against Socony, but even though Oil City was the first user of the trademark, *it is not thereby relieved of the charge of unfair competition* and if this charge is supported by the findings of the Master, the court was correct in dismissing its counterclaim * * * Had Oil City been content to let its products make their own way under its own trademark in the field of opportunity and fair competition, that would have been the end of it, but it availed itself of unfair means, either expressly or tacitly, to sell its products to the ultimate purchaser as and for those of Socony." (Italics ours.)

Thus the Petitioner seeks to charge the Court of Appeals with implying that, if it had used only a white flying horse, it could have stopped the use of a red flying horse by Respondent, *even though it was guilty of the fraudulent acts found.* The court did not imply any such thing. All it said was that, if there had been the single point at issue, of prior use, without the finding of fraud on the part of the Petitioner, then the Petitioner would have been entitled to an injunction.

Since the argument of Petitioner is, in effect, that color, i.e., change from white to red, is immaterial, and since the Ohio law controls, the opinion of the court in *Safe Cabinet Company vs. Globe-Wernicke Company,* 3 O. App. 24, cited by Petitioner is significant. It was there held that imitation of color *in combination with other circumstances of fraud* (as here) "show that it (the defendant) was actuated by the desire to gain the benefit of the expense and effort that had been borne by plaintiff in stimulating and creating a market for its product." The holding of the Circuit Court of Appeals (R. 271) is to the same effect:

"Color is frequently an important factor in determining the question of unfair competition."

ABANDONMENT AND LACHES WERE MATERIAL ISSUES.

(Petitioner's Argument VII.)

Petitioner argues (Petition, pp. 39, 40) that since the Master failed to hold that there was a technical abandonment of the mark by Petitioner, or that Petitioner was guilty of laches, that there can be no justification for the decisions of the courts below.

While it is true, as Respondent has heretofore pointed out, that the Master was of the opinion that the determination of *either of these questions standing alone* would not justify a judgment for Respondent, he definitely held that the facts and circumstances shown by the evidence upon the issues of abandonment and laches were important in determining the ultimate questions upon which his conclusions were based. (R. 47.)

That the evidence upon the issues of abandonment and laches was given great weight in the final determination is readily apparent from the following conclusions of the Special Master, affirmed below:

"Upon the entire record before us, what judgment should be rendered in order that substantial justice may be done as between these parties?

"And in this case the conclusion, I think, must be reached with some regard for the public interest involved." (R. 47.)

"The entire circumstances of the defendant's conduct in cessation of use of this symbol to identify its trade and products over the period of time when such cessation is shown; its resumption of use of the symbol knowing of the trade value which had been attached to it by the plaintiff, and finally using a red flying horse to the exclusion of any other color, are such as to indicate a disregard of the public right and an intention to appropriate to itself a part of the plaintiff's good

will and business, which should not be permitted." (R. 52, 53.)

PETITIONER GUILTY OF FRAUD, NOT RESPONDENT.

(Petitioner's Argument VIII.)

Petitioner argues that:

> "The Court of Appeals has treated this case as if petitioner were guilty of fraud by using its own trade mark in a way to curtail or interfere with the infringing activities of respondent in petitioner's territory; but the fraud in this case was by respondent in wantonly and extensively using the flying horse as a trade mark for petroleum products in Ohio over the protest of petitioner."

Unquestionably the Circuit Court of Appeals held that Petitioner was guilty of fraud. That was what the Special Master found and what the District Court held. The Circuit Court of Appeals very properly refused to disturb these findings. Petitioner's fraud, its disregard of public right and intention to appropriate Respondent's good will and business are settled and unchangeable facts and findings in this case. To now allege that Respondent was guilty of fraud is a misstatement of the Record and exactly contrary to the findings below. As stated above, it is an attempt by Petitioner to rewrite and reverse the findings of fact of the Special Master, which were approved and confirmed by the courts below. It is an attempt by Petitioner to obtain a review by this Court, of the concurrent findings of the lower courts, contrary to the established rule.

COSTS.

(Petitioner's Argument IX, X.)

Petitioner argues, in substance, that it should have been awarded the costs below, because the judgment should have been in its favor. The answer is that the judgment

was against the Petitioner and the costs were properly awarded in the sound discretion of the Court.

The Petition also makes reference to the allowance of costs on appeal to defendant John Roski, and failure to allow his costs in the District Court. A court of equity may exercise discretion on the subject of costs. It may impose them all upon one party, or divide them as it sees fit. Appeal does not lie from a decree for costs; and if an appeal on the merits is affirmed with respect thereto, the decree will not be reversed upon the question of costs.

Kittredge v. Race, et al., 92 U. S. 116, 23 L. Ed. 488;
DuBois v. Kirk, 158 U. S. 58, 39 L. Ed. 895, 15 S. Ct. 729;
Van Kannel Revolving Door Co. v. Uhrich, et al., (C. C. A. 8th), 297 Fed. 363, cert. den. *Uhrich v. Van Kannel Revolving Door Co.*, 45 S. Ct. 91, 266 U. S. 604, 69 L. Ed. 463.

Furthermore, Petitioner cannot complain about this ruling, which does not affect it, but only affects John Roski who is not a party to the Petition herein.

CONCLUSION.

For the reasons herein set forth, the Petition for a Writ of Certiorari should be in all respects denied.

Respectfully submitted,

JOHN J. MANNING,
New York City,
Counsel for Respondent.

FRANK E. LEWELLEN,
Detroit, Michigan,

C. W. SELLERS,
Cleveland, Ohio,
Of Counsel.